Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

COMMONWEALTH OF KENTUCKY - - Petitioner

versus

DAVID WAYNE LINEHAN - - - - - Respondent

On Petition for a Writ of Certiorari
to the Supreme Court of Kentucky

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTION PRESENTED

Whether, when there was no Sixth Amendment violation in obtaining admissions of guilt to new crimes, those admissions may be introduced for a relevant purpose at a trial of pending charges, without creating an independent violation of the Sixth Amendment?

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v.

DAVID WAYNE LINEHAN - - - - - *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Commonwealth of Kentucky respectfully petitions for a writ of certiorari to review the opinion of the Supreme Court of Kentucky in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky (App., *infra*, 1a-10a) has not yet been reported in the Southwest 2d Reporter. The order of the trial court (App., *infra*, 11a-12a) and the opinion of the Kentucky Court of Appeals (App., *infra*, 13a-17a) are unreported.

JURISDICTION

The Supreme Court of Kentucky rendered its opinion on May 26, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

A. The Crimes and the Interrogations[1]

In September 1991, 20-year old L.L.[2] informed her husband, David Wayne Linehan, that she wanted a divorce. After Linehan unlawfully detained her in their apartment in an effort to force a reconciliation, L.L. obtained an emergency protective order against Linehan on September 9, 1991, and later moved into her father's home at 4613 Rossmoor Drive. The order was in effect on September 20, 1991.

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[1]This information is taken from the pretrial discovery materials provided by the Commonwealth to respondent. These discovery materials were also provided to the trial court and are part of the record on appeal.

[2]It is the policy of the Kentucky Attorney General to identify sexual assault victims by their initials, when referring to them in public pleadings.

L.L. alleges that, on September 20, 1991, Linehan entered the Rossmoor Drive residence without her permission. She further alleges that, once inside, Linehan threatened to cut her with a knife if she did not have sexual intercourse with him. L. L. submitted to the forced sexual intercourse.

Linehan was arrested later in the day on September 20. After being fully advised of his *Miranda*[3] rights, Linehan waived those rights and chose to talk to the investigating officer. Linehan made a voluntary statement in which he admitted to having sexual intercourse with L.L., but claimed that it had been with L.L.'s consent.

On October 24, 1991, the Jefferson County Grand Jury returned Indictment 91CR1977, charging Linehan with one count of First Degree Rape and one count of First Degree Burglary, for his alleged actions on September 20, 1991. He was arraigned in Jefferson Circuit Court on November 4, 1991. Assistant Public Defender David Ward was appointed to represent Linehan in his defense of those charges.

While awaiting trial on those charges, Linehan allegedly engaged in a second series of attacks upon L.L.

She alleges that, on February 28, 1992, Linehan approached her outside the Rossmoor Drive home, as she was leaving for work. She refused Linehan's order to get into the car. When he came toward her, L.L. unsuccessfully attempted to spray Linehan with mace. L.L. alleges that Linehan then punched her in the face several times. He then choked her until she blacked out. Allegedly, Linehan put her into his car and drove her to McNeely Lake, also in Jefferson County. L.L. alleges that, once there, Linehan fondled her breasts, put his finger into her vagina, made her masturbate him and forced her to have

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[3]*Miranda* v. *Arizona*, 384 U.S. 436 (1966).

sexual intercourse with him. At some point during this assault, L.L. told Linehan that, if he would release her, she would drop the existing charges against him. Linehan allegedly responded that he knew she would and that was why he was doing what he was doing. Once she was able to get away from Linehan, L.L. called the police and reported the attack.

The police arrested Linehan later that day on the new charges. After being fully advised of his *Miranda* rights, Linehan formally waived those rights and chose to talk with the police. He did not ask to speak with counsel. He made statements only about the February 28 incident, including an admission that he had assaulted L.L.

On March 5, 1992, the Jefferson County Grand Jury returned Indictment 92CR0514, charging Linehan with one count of Kidnapping, one count of First Degree Rape, one count of Second Degree Assault, one count of Intimidating a Witness, and three counts of First Degree Sexual Abuse, for his alleged actions on the morning of February 28, 1992. He was later arraigned in Circuit Court on the new indictment.

B. Proceedings Below

The Commonwealth moved to consolidate the two indictments for trial, pursuant to Kentucky Rule of Criminal Procedure (RCr) 9.12[4]. The trial court granted that motion, over respondent's objection.

On May 19, 1992, Mr. Linehan filed a pretrial motion to suppress the statements he had made to the police on February 28. (Transcript of Record, hereinafter TR, 34-37)

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[4]RCr 9.12, together with RCr 6.18, allows for consolidation of indictments for trial ". . . if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan."

He noted that he was awaiting trial on Indictment 91CR1977 and had counsel of record on February 28. Therefore, he reasoned, the Sixth Amendment required the police to notify his attorney of record before they questioned him about the February 28 offenses.

The Commonwealth filed its response, opposing the motion. (TR 38-49). The Commonwealth relied upon this Court's opinion in *McNeil* v. *Wisconsin*, 501 U.S. 171 (1991) and argued that Mr. Linehan's Sixth Amendment right to counsel had not attached to the February 28 crimes when he was questioned that day. Accordingly, the Commonwealth argued, Mr. Linehan's *Miranda* waiver of his Fifth Amendment right to counsel was valid and the statements he made would be admissible against him at trial.

Without holding the evidentiary hearing required by RCr 9.78[5] or reviewing the substance of the interrogation, the trial court entered a written order suppressing the February 28 statements. (App 11a-12a; TR 63-64). The trial court simply ruled, "The defendant's motion that the statement taken from the defendant on February 28, 1992 is suppressed and disallowed for use at trial, in that the defendant had counsel of record." (App 11a; TR 63)

Under the authority of Ky. Rev. Stat. Ann. 22A.020(4), the Commonwealth challenged the legality of the trial court's order by pretrial appeal. (TR 65)

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[5]RCr 9.78 provides, in part, "If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by him to police authorities or (b) the fruits of a search, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling."

By unanimous opinion, the Kentucky Court of Appeals reversed the ruling of the trial court. (App. 13a-17a) That court first found that, at the time Mr. Linehan was arrested and questioned regarding the February 1992 charges, no adversarial judicial criminal proceedings concerning those charges had been instituted against him. Therefore, pursuant to *McNeil, supra*, the Court of Appeals concluded that Linehan's Sixth Amendment right to counsel was not violated by the questioning.

The Court of Appeals disagreed with the Commonwealth's position that the trial court should have conducted a hearing to consider the questions and answers comprising the February 28 interrogation. However, it noted that the record was silent about whether Mr. Linehan made any incriminating statement(s) on February 28 relating to the September 20 charges. Therefore, on remand, the Court of Appeals directed the trial court to determine if he made any such statements. If so, the trial court was to suppress those statements as having been obtained in violation of Mr. Linehan's right to counsel respecting the earlier offenses. Statements relating to the February 28 attack would be admissible.

The Supreme Court of Kentucky granted Mr. Linehan's motion to review the decision of the Kentucky Court of Appeals. In a 4-3 decision, the Kentucky Supreme Court reversed the decision of the Court of Appeals. (App. 1a-10a).

As an initial matter, the majority agreed that joinder of the two indictments had been proper and that, under Kentucky Rule of Evidence 404(b), evidence of the February 28 crimes would be admissible to incriminate Linehan on the September 20 offenses. The majority purported to rely squarely upon this Court's decision in *McNeil, supra*, and in accordance with that decision, concluded that Linehan's Sixth Amendment rights did not apply to the February 28 offenses at the time he made his statements that day.

The majority noted that the statement taken on February 28, 1992 related to the commission of the crimes specified in the later indictment. There was no finding that the questions or answers on that date were directed in any way to the details of the crimes committed on September 20[6]. However, the majority reasoned that Mr. Linehan's admission that he had committed the February 28 offenses would amount to circumstantial evidence that he had also committed the September 20 offenses.

In rejecting the arguments of both the Commonwealth and Mr. Linehan, the four justices in the majority stated, "We, of course, intend neither to stop short of the accused's constitutional rights nor to proceed beyond." The majority concluded:

> For the reasons stated, we reverse the decision of the Court of Appeals and affirm the suppression order of the trial court, with the understanding that the trial court's order is interlocutory in character and that the Commonwealth, if the trial court so permits, may elect to sever the indictments for trial. In such event, use of the statement of February 28, 1992 to incriminate the accused on the new offenses would be proper, but use as evidence against him on trial of the first set of offenses is constitutionally impermissible.[7]

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[6]As the Court of Appeals noted in its opinion, the record on appeal was silent as to the specifics of the February 28 interrogation. Because the trial court had refused to conduct the required evidentiary hearing, neither the tape recording of the interrogation nor a transcript of that recording were before the trial court, the Court of Appeals or the Kentucky Supreme Court.

[7]While the Supreme Court designated the trial court's order as "interlocutory," it is clear that the Supreme Court's ruling that Linehan's February 28 statements cannot be used in any prosecution for the September 20 offenses fully resolves the question presented against the Commonwealth in this prosecution.

The three dissenting justices agreed that the holding in *McNeil* governed the issue in the case. However, these justices believed the Court of Appeals had correctly applied *McNeil* to these facts. The minority would hold that, in a joint trial, the February 28 statements would be admissible to establish guilt under either or both indictments.

C. The Companion Opinion

On the same day it heard arguments in this case, the Kentucky Supreme Court heard arguments on a similar question in *Glenn Fred Phillips, Jr.* v. *Commonwealth of Kentucky*, No. 92- SC-1016-MR. The Court rendered opinions in both cases on May 26, 1994. (App 18a-28a).

Phillips was tried, in a single trial, on charges that he had committed two armed robberies, one occurring on October 14, 1991 and the other on October 15, 1991. Phillips had been initially identified and arrested on the October 15 robbery. After he had been arraigned and appointed counsel on that charge, he was visited in jail by the officer investigating the October 14 robbery. Phillips confessed to that crime; the lawyer appointed on the October 15 robbery was not present.

The Kentucky Supreme Court ruled that it was proper to try Phillips on both charges in a single trial. The Court then found that Phillips had validly waived his rights under *Miranda* before confessing to the October 14 robbery. Finally, the Supreme Court rejected Phillips' argument that his confession to the October 14 robbery would not have been admissible in a separate trial on the October 15 robbery.

The Court ruled that admission of the confession in a separate trial of the October 15 robbery would not violate Phillips' Sixth Amendment right to counsel. The Court noted that, in *Phillips*, the officer deliberately did not elicit any information about the October 15 robbery. In spite of

its earlier holding that the similarities of the two crimes were sufficient for the Commonwealth to introduce evidence of each at separate trials to show common scheme or plan, the Court reasoned that Phillips' "confession to the October 14th robbery in no way incriminated him as to the October 15th robbery..." Therefore, the Court concluded, its admission in a single trial for both offenses did not violate his Sixth Amendment right to counsel.

The Kentucky Supreme Court distinguished its decision in the present case by reasoning, "Unlike [Phillips], however, Linehan also made statements that were circumstantially incriminating as to the earlier charges against him."

The Kentucky Supreme Court denied the Commonwealth's motion to publish its opinion in *Phillips* v. *Commonwealth*. (App. 28a).

D. Present Status of the Prosecution

Mr. Linehan is presently in custody, awaiting trial on both indictments. The Kentucky Supreme Court has denied the Commonwealth's motion to stay the effect of its order until the Commonwealth could seek review by this Court.

REASONS FOR GRANTING THE PETITION

In every prosecution in the United States, there is the possibility that the defendant will unlawfully attempt to alter the outcome by bribing or threatening witnesses or by attempting to destroy evidence. Evidence of such actions is generally admissible to show the defendant's consciousness of guilt. If obtained in accordance with the Constitution, defendants' admissions that they engaged in new illegal conduct should be admissible to show their consciousness of guilt as to the original charge(s).

That is the conclusion reached by the clear majority of courts that have considered the question. These courts

have determined that, if there was no constitutional violation in obtaining the incriminating statements, there can be no constitutional impediment to presenting such statements to the jury.

While this Court has not squarely addressed the question, its Sixth Amendment precedents indicate that this conclusion is accurate. The confusion in the courts which have reached a different conclusion appears to stem from the exaggerated importance they have ascribed to certain phrases from those precedents. Only this Court can resolve the conflict and confusion in the lower courts on this question of national significance.

I. The Kentucky Supreme Court's Application of the Sixth Amendment in this Case is Inconsistent with the Precedents of this Court.

In *Massiah* v. *United States*, 377 U.S. 201 (1964) and subsequent decisions, the Court has ruled that a Sixth Amendment violation occurs when police deliberately elicit comments from the defendant about the details of a crime under indictment for which the defendant has counsel, without counsel being present. It is clear from these decisions that the violation occurs at the instant police, or their agent(s), *obtain* the incriminating statements without counsel present.

The Court has reasoned that any confrontation between the police and the defendant after indictment, concerning the subject matter of the indictment, is a critical stage of the prosecution. Therefore, the Constitution guarantees an accused the right to rely upon counsel as a medium between the accused and the state. *Maine* v. *Moulton*, 474 U.S. 159 (1985). Failure to honor the accused's right to have counsel present when the incriminating statements are obtained will invalidate what is otherwise a valid waiver of the accused's *Miranda* rights. *Michigan* v. *Jackson*, 475 U.S. 625 (1986).

At the same time, the Court has consistently recognized the considerable costs to society associated with enforcement of this right. The Court has historically recognized that voluntary confessions of guilt are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law. *Moran* v. *Burbine*, 475 U.S. 412 (1986). A balance has been struck between the accused's right to counsel and society's duty to investigate new or additional crimes by recognizing that this Sixth Amendment right is "offense-specific." *McNeil* v. *Wisconsin*, 501 U.S. 171 (1991). The right is specific to the crime(s) to which it has attached and been invoked. In similar fashion, its *Michigan* v. *Jackson* effect of invalidating subsequent waivers in police-initiated interviews is offense- specific. *Id.*

Certain principles emerge from the decisions. Police violate the right by deliberately eliciting uncounseled statements about the details of the crimes to which the right has attached. Police may legally elicit uncounseled statements about the details of new or additional offenses, given a valid *Miranda* waiver. It would be possible for the police to legally obtain some statements and illegally obtain other statements during the same interrogation. *See Maine* v. *Moulton, supra.* *Michigan* v. *Jackson* would only invalidate the otherwise valid waiver for those statements that go *directly* to the crime under indictment. The *Miranda* waiver would still be valid for those statements that go directly to the new or additional crime. Statements that are legally obtained are admissible, subject to other non-constitutional evidentiary considerations. A court's focus must be on the questions asked, to determine whether they were designed to deliberately elicit details of the original crime(s).

The application of these principles to this case is clear. It is accepted that Linehan's *Miranda* waiver on February 28 was valid. Because there was no evidentiary hearing,

neither the tape of the interrogation nor a transcript of that tape were admitted into evidence. The details of the interrogation are likewise not a part of the record on appeal. To date, none of the three Kentucky courts that have ruled upon this issue have reviewed the February 28 statement. Therefore, it would be impossible for them to determine whether the principles just discussed have been violated[8]. As the Kentucky Court of Appeals ordered, the trial court must conduct such an analysis and limit its suppression order to those statements made on February 28 that go directly to the details of the September 20 crimes. Linehan's statements that go directly to the February 28 crimes are admissible, because there is no independent state basis for excluding them.

The decision of the Kentucky Supreme Court suppressing all statements made on February 28 from the trial of the September 20 charges, regardless of their nature, because they provide *circumstantial* proof of Linehan's guilt on those charges is erroneous and inconsistent with the precedents of this Court. If the manner of *obtaining* the statement(s) did not violate the Constitution, the *admission* of such statements against the defendant does not create an independent constitutional violation[9].

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[8]The Commonwealth would submit that all of the questions were limited to the details surrounding the February 28 offense. Even if some of the questions related to the September 20 offense, only the answers to those questions should be suppressed. That is precisely the conclusion reached by the Kentucky Court of Appeals and the dissenting opinion in the Kentucky Supreme Court.

[9]The analysis by the majority of the Kentucky Supreme Court is similar to ruling that a search was lawfully conducted, but any attempt to *admit* the fruits of the search at trial would create a Fourth Amendment violation.

II. The Decision of the Kentucky Supreme Court Is in Conflict with the Decisions of Other States and Federal Courts of Appeals.

In Kentucky, evidence that the defendant has attempted to influence or avoid a witness' testimony through violence or bribery is admissible to show a consciousness of guilt. *Campbell* v. *Commonwealth*, 564 S.W.2d 528, 530 (Ky. 1978); *Manning* v. *Commonwealth*, 217 S.W.2d 226, 228 (Ky. 1949). Kentucky Rule of Evidence 404(b) allows for admission of other acts by the defendant for specified purposes. Other jurisdictions have similar evidentiary rules, and it is in this context that those courts have addressed the question presented.

At least five of the federal courts of appeals have held that it is permissible for the government to use uncounseled post-indictment statements as substantive evidence of guilt on pending charges, when those statements constitute new criminal acts, or are admissions of new criminal acts, and do not refer to the pending charges. *Grieco* v.*Meachum*, 533 F.2d 713 (1st Cir.), *cert. denied*, 429 U.S. 858 (1976) (attempt to suborn perjury admissible in murder trial); *United States* v. *DeWolf*, 696 F.2d 1 (1st Cir. 1982) (attempt to have witness change testimony admissible at trial of original charge); *United States* v. *Kidd*, 12 F.3d 30 (4th Cir. 1993), *cert. denied*, 511 U.S. ___ (1994) (post-indictment drug sale admissible at sentencing); *United States* v. *Merritts*, 527 F.2d 713 (7th Cir. 1975) (post-indictment statements admitting past misconduct and soliciting a bribe; allowed statements concerning bribe); *United States* v. *Moschiano*, 695 F.2d 236 (7th Cir. 1982), *cert. denied*, 464 U.S. 831 (1983) (post-indictment drug sale used to rebut entrapment defense); *United States* v. *Taxe*, 540 F.2d 961 (9th Cir.), *cert. denied*, 429 U.S. 1040, *U.S. reh'g denied*, 429 U.S. 1124 (1976) (attempt to change witness' testimony used to impeach defendant's testimony); and, *United States* v. *Darwin*, 757 F.2d 1193 (11th Cir. 1985), *cert.*

denied, 474 U.S. 1110 (1986) (statements arranging to murder key government witness admissible on original charge).

At least seven states have reached the same conclusion. *Crawford* v. *State*, 377 So.2d 145 (Ala.Cr.App. 1979), *vacated on other grounds*, 448 U.S. 904 (1980), *rev'd on other grounds*, 405 So.2d 702 (Ala. 1981) (statements attempting to arrange murder of chief state witness admissible in pending murder trial); *People* v. *Plyler*, 22 Cal.Rptr.2d 772 (Cal.App.1 Dist. 1993) (post-indictment statements to second sexual abuse victim admissible in joint trial of two victims); *In Interest of T.M.*, 466 N.E.2d 1328 (Ill.App.3 Dist. 1984) (confession to new burglary and theft admissible in pending juvenile dispositional hearing); *People* v. *Dotson*, 574 N.E.2d 143 (Ill.App.1 Dist. 1991) (orders to co- defendant not to talk to authorities admissible in trial of weapons charge); *State* v. *Salgado*, 473 So.2d 84 (La.App.5 Cir. 1985) (statements to immigration officer used to impeach); *Hall* v. *State*, 425 A.2d 227 (Md.App. 1981), *aff'd*, 441 A.2d 708 (Md. 1982) (statements to probation officers used to impeach); *People* v. *Mealer*, 57 N.Y.2d 214, 441 N.E.2d 1080, 455 N.Y.S.2d 562 (Ct.App. 1982), *cert. denied*, 460 U.S. 1024 (1983) (attempt to bribe eyewitness to shooting admissible in trial of shooting); *Hummel* v. *Commonwealth*, 247 S.E.2d 385 (Va. 1978), *cert. denied*, 440 U.S. 935 (1979) (attempt to bribe key witness admissible in trial of original charges).

The decision by the majority of the Kentucky Supreme Court in the present case is in direct conflict with the holdings and the reasoning of each of these decisions.

III. There is an Intolerable Conflict Between the New York Courts and the Second Circuit Court of Appeals on the Question Presented.

As noted in the previous section, New York has adopted the position advanced here by petitioner, in *People* v. *Mealer*, *supra*. Mealer had been indicted for murder and

was incarcerated while awaiting trial. Mealer's wife approached an eyewitness and stated Mealer was willing to "help him out" if he would contradict his earlier statements to the police. The witness informed the police and was instructed to visit the defendant in jail and to "play along" if offered a bribe. On visiting the defendant, the witness was offered $300 to perjure himself. This evidence was introduced in the murder trial and Mealer was convicted. In denying Mealer's Sixth Amendment challenge, the New York Court of Appeals held:

> A suspect whose right to counsel has attached with respect to a past crime may be subjected to questioning outside the presence of counsel by police who are investigating a new crime in progress, so long as the questioning is legitimately related to the new crime. Evidence thereby obtained, if not otherwise violative of the suspect's rights, may be presented to prove the suspect guilty of the past crime.

Mealer's conviction was affirmed by the New York court. Relying upon the decisions by the First and Seventh Circuits, the United States District Court for the Southern District of New York agreed with the reasoning of the New York court. The District Court denied Mealer's habeas corpus petition. *Mealer* v. *Jones*, 573 F.Supp. 675 (S.D. N.Y. 1983).

The Second Circuit Court of Appeals took a different view. *Mealer* v. *Jones*, 741 F.2d 1451 (2d Cir. 1984), *cert. denied*, 471 U.S. 1006 (1985). Relying upon this Court's one-sentence order in *Beatty* v. *United States*, 389 U.S. 45 (1967) and *dicta* from its previous opinion in *United States* v. *Pineda*, 692 F.2d 284 (2d Cir. 1982), the Second Circuit ruled that admission of the bribe offer in the murder trial was error. However, that court upheld denial of the petition because it found the error was harmless.

In *People* v. *Otero*, 486 N.Y.S.2d 825 (Sup. 1985) *aff'd*, 511 N.Y.S.2d 103 (1987), Otero's first murder trial ended

in a hung jury. Before the second trial, Otero attempted to induce a witness to change her testimony. After the witness reported this fact to the police, they arranged for her to record her next conversation with the defendant. The witness was instructed not to discuss the murder charge, but only to give the defendant an opportunity to bribe her. The taped conversation contained no mention of the murder charge, only the bribe offer. After indicting Otero for bribery, the state moved to consolidate the charges for trial, asserting the bribe offer was admissible as evidence of Otero's consciousness of guilt.

After reviewing the *Mealer* trilogy, the trial judge termed the conflict between the New York courts and the Second Circuit Court of Appeals on this question "irreconcilable." While concluding that New York courts had correctly decided the issue and would continue to decide the issue in that manner, the judge recognized the reality that the Second Circuit would likely grant any resulting habeas corpus petition. Therefore, even though he considered the evidence admissible and joinder proper, he denied the state's motion after considering the considerable cost to the state, the families and the witnesses which would result from having to go through a second and then a third trial.

Such a conflict is untenable, but can only be resolved by a decision of this Court finally resolving the question presented.

IV. Confusion as to the Proper Resolution of this Question is Growing Within Individual Jurisdictions.

As noted in Section II, supra, courts in California and Maryland, as well as the First Circuit and the Eleventh Circuit have previously resolved the question in the manner advanced by the petitioner in this case. However, confusion has begun to grow in those jurisdictions regarding the question. The confusion has resulted from courts

giving undue influence to phrases in the Court's opinion in *Maine* v. *Moulton*, 474 U.S. 159 (1985).

The key passage in *Moulton* is found at pages 498-499:

> To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in Massiah. On the other hand, to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel.

At note 16, the Court stated, "Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses."

In *In Re Wilson*, 838 P.2d 1222, 1225 (Cal. 1992), *cert. denied*, 507 U.S. ___ (1993), the California Supreme Court interpreted this passage to mean:

> Incriminating statements obtained in circumvention of a defendant's right to counsel with respect to a charged offense, however, are inadmissible at the trial *of that charged offense* even if they pertain to a new and uncharged crime.

Based upon this interpretation, the court concluded that the defendant's statements, made while attempting to find

a "hit man" to eliminate a witness in his pending murder and robbery prosecution, should not have been admitted in the murder/robbery prosecution. The court reached this conclusion even though the remarks did not directly refer to the charged offenses. Although *Wilson* appears to be in conflict with a later opinion by the California Court of Appeals in *People* v. *Plyler, supra*, the *Plyler* decision does not mention *Wilson*.

Maryland, the First Circuit and the Eleventh Circuit have focused upon footnote 16 of the *Moulton* opinion and have given particular emphasis to the phrase, "at a trial of those offenses." Like Mr. Wilson in California, the defendants in *Bruno* v. *State*, 613 A.2d 440 (Md.App. 1992), *aff'd*, 632 A.2d 1192 (1993) and *United States* v. *Terzado-Madruga*, 897 F.2d 1099 (11th Cir. 1990) worked to defeat their pending prosecutions by searching out "hit men" to eliminate government witnesses. In each of those cases, the defendant made statements to government agents while attempting to arrange for the "hit." These courts seemed to read footnote 16 of *Moulton* to prohibit introduction of such statements at the trial of the original charges to show consciousness of guilt. In fact, the Eleventh Circuit questioned the continuing validity of its earlier decision in *United States* v. *Darwin, supra*. Referring to its holding in *Darwin*, the Eleventh Circuit noted, "...the *Moulton* court expressly rejected a similar standard as a basis for allowing the evidence to be admitted at trial." 897 F.2d, at 1110.

In *Bruno*, the Maryland Court of Special Appeals failed to refer to its earlier opinion in *Hall* v. *State, supra*. *Cf. United States* v. *Nocella*, 849 F.2d 33 (1st Cir. 1988) and *United States* v. *DeWolf* and *Grieco* v. *Meachum, supra*.

The decision by the Kentucky Supreme Court in this case also appears to be a product of this confusion about the meaning of *Maine* v. *Moulton*. In *Deskins* v. *Commonwealth*, 512 S.W.2d 520 (Ky.), *cert. denied*, 419 U.S. 1122 (1974), the defendant was awaiting trial for the murder of

his wife. In an attempt to gain a tactical advantage, Deskins approached Davidson and offered him $600 to steal the prosecutor's files. After reporting the offer to the prosecutor, Davidson agreed to tape record further conversations with the defendant about this arrangement. The Kentucky Supreme Court held that the introduction of these statements in the murder trial did not violate *Massiah* v. *United States*, 377 U.S. 201 (1964). The Commonwealth submits that the Kentucky Supreme Court's decision in the present case, based upon the present court's understanding of *Moulton*, is directly contrary to its earlier opinion in *Deskins*, which was not mentioned or overruled, and is directly contrary to its companion opinion in *Glenn Fred Phillips, Jr.* v. *Commonwealth*.

The confusion surrounding *Moulton* is somewhat understandable. Moulton and Colson were charged with a series of thefts. After they had appeared at arraignment with their retained counsel, Colson reported that he had received threatening phone calls. After Moulton suggested they kill a state's witness, Colson went to the police and agreed to testify against Moulton and otherwise cooperate in the prosecution of Moulton on the pending charges. In subsequent conversations with Colson, Moulton made incriminating statements about both the pending charges and his threats to harm the witnesses. At the theft trial, the state introduced Moulton's post-indictment statements about the theft charges. Because these statements were obtained in violation of Moulton's Sixth Amendment right to counsel, the Court agreed it was error to admit the statements in the theft trial.

In dissent, three members of the Court referred to many of the cases cited in Section II, supra, and noted, "Until today, the clearly prevailing view in the federal and state courts was that *Massiah* and its successors did not protect a defendant from the introduction of post-indictment statements deliberately elicited when the police undertook an

investigation of separate crimes." *Moulton*, 474 U.S., at 504. (C.J. Burger, dissenting). Apparently, the fact that this comment and reference to the supporting decisions are found in a dissenting opinion has caused some lower courts to assume that the reasoning in those decisions has been expressly rejected by a majority of the Court. *See Terzado-Madruga, supra.* This assumption is faulty, because it rests upon the additional premise that Moulton's post- indictment statements concerning the possibility of killing witnesses was introduced at his theft trial. They were not. *Moulton*, 474 U.S., at 490, 500-501. Therefore, there is no reason to conclude that the majority rejected the reasoning of the decisions cited at footnote 4 and elsewhere in Chief Justice Burger's dissenting opinion.

The Court should accept review of the question presented in order to eliminate the growing confusion among the lower courts about the meaning of the Court's decision in *Moulton*.

V. The Court Should Decide this Important Federal Question.

To date, the Court's decisions have addressed the two extremes of this Sixth Amendment protection - cases where statements taken in violation of *Massiah* have been introduced at the trial of the original charges, or cases where statements lawfully obtained about new or additional crimes were only introduced at the trial of those new or additional crimes. While both types of statements were obtained in *Moulton*, the Court was not squarely faced with the question presented here, because Moulton's statement about the new crime was not admitted to show consciousness of guilt as to the original theft charges. The Court should take this opportunity to resolve this question of national significance.

The question presented in this case arose in the context of a domestic violence prosecution. It is estimated

that three to four million women are victims of violence in their homes each year. Biden, "Domestic Violence: A Crime, Not a Quarrel" *Trial*, June 1993, at 56. According to a 1988 Department of Justice Crime Survey, an average of 456,000 cases of family violence are reported each year. DOJ, *National Crime Survey; Report to the Nation*, 2d Ed. (March 1988), at 3. Between 9 and 33 % of these offenders will attack the victim again within six months of the initial report. Williams, "Spouse Abuse Research Raises New Questions About Police Response to Domestic Violence" *Police Foundation Reports*, (October 1992), at 5.

In this case, the defendant is alleged to have sexually assaulted the victim while he was awaiting trial on charges that he had broken into her home and raped her five months earlier. According to the victim, the defendant told her the new sexual attack was designed to get her to drop the pending charges against him.[1] Both the Kentucky trial court and the Kentucky Supreme Court have ruled that, during the trial on the original burglary/rape charges, the jury may hear evidence that Linehan kidnapped and raped the victim a second time five months later. However, these same courts have also ruled that same jury may not hear the defendant's incriminating admissions about the second assault. The Kentucky courts believe this anomalous result is dictated by the Sixth Amendment to the United States Constitution. Looking simply at the large number of domestic violence prosecutions across the country each year, the Court should resolve this perplexing dilemma.

The Court will recognize that the issue presented is broader than the number of domestic violence prosecutions each year. The question presented could arise in each and every prosecution in the country. Any time a defendant believes that an unlawful advantage may be gained in their pending prosecution by bribing, threatening or killing the government's witness(es), the defendant will likely make post-indictment statements in an effort to carry out

such a scheme. Where the authorities are sufficiently lucky to learn about the scheme in time, they will likely attempt to capture some or all of these statements. If successful, they should attempt to introduce those statements at the trial of the original charges to show consciousness of guilt. The trial court in each case will be faced with the question presented. This case presents the Court with the opportunity to fully resolve the growing confusion and conflict between the lower courts on this question. By resolving this question, the Court would complete its review of this important area of the law.

In each of the Court's decisions delineating the parameters of the Sixth Amendment right to counsel, the Court has attempted to balance a defendant's legitimate right, to rely upon counsel as a medium between the accused and the government, with society's legitimate interest in investigating and prosecuting new or additional crimes. In this case, the Court will have to determine whether, after the right to counsel has attached, an accused may use the Sixth Amendment as a "magic cloak" to unlawfully subvert the truth-finding process of the trial. Where the jury hearing the original charges is permitted to consider evidence that the defendant committed new crimes, for a relevant purpose, the jury should also be allowed to hear the defendant's incriminating admissions about the commission of the new or additional offense(s).

CONCLUSION

For all of these reasons, the Court should grant the petition for writ of certiorari to the Supreme Court of Kentucky.

Respectfully submitted,

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APPENDIX

RENDERED: MAY 26, 1994
TO BE PUBLISHED

93-SC-432-DG

SUPREME COURT OF KENTUCKY

DAVID WAYNE LINEHAN - - - - - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - - - - - *Respondent*

On Review From Court of Appeals
No. 92-CA-1940
Jefferson Circuit Court
Hon. Ken G. Corey, Judge
Indictment No. 91-CR-1977

OPINION OF THE COURT BY JUSTICE LEIBSON REVERSING AND REMANDING

The issues before us concern the accused's right to counsel at a police-initiated interrogation. They arise in the context of an interlocutory appeal to the Kentucky Court of Appeals taken by the Commonwealth pursuant to KRS 22A.020(4). The Commonwealth appealed from an order entered by the Jefferson Circuit Court on July 29, 1992 specifying that a "statement taken from the defendant on February 28, 1992, is suppressed and disallowed for use at trial, in that the defendant had counsel of record."

The facts of the case are as follows: David Linehan is charged with having entered the home of his estranged

wife on September 20, 1991, without her permission, and forcing her to engage in sexual intercourse under threat of cutting her with a knife. He was arrested later that day, and after being advised of his *Miranda* rights (*Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)), he signed a form waiving those rights, and he made a voluntary statement admitting to unlawful entry but claiming consensual sex. He was indicted for first-degree rape and first-degree burglary on charges arising from the events of this day, arraigned on November 4, 1991, and the local public defender was appointed to represent Linehan on this indictment.

Five months after this first alleged attack, on February 28, 1992, Linehan allegedly engaged in a second series of assaults upon his estranged wife. Allegedly, he accosted her in front of her home, ordered her into his car, and when she refused, assaulted her, forced her into his car, drove her some distance to a lake in Jefferson County, and once there forced himself upon her sexually. He was arrested later that day, advised of his *Miranda* rights, and after executing a form waiving his rights, gave what appears to be a voluntary statement partially incriminating as to these new charges and also suggesting that his purpose in accosting his estranged wife was at least in part to intimidate her regarding the previous charges for which he had already been indicted. On March 5, 1992, Linehan was indicted on new charges with reference to the events of February 28, 1992, of kidnapping, first- degree rape, second-degree assault, intimidating a witness, and three counts of first-degree sexual abuse.

The public defender's office in Louisville was once again appointed to defend him on the new charges. The indictment on the new charges was initially assigned to a different division of the Jefferson Circuit Court from that in which the indictment on the old charges was pending, but was then ordered to be transferred to the division where the old charges were pending and consolidated with those charges for trial. The Commonwealth's Memorandum of

Law in Support of its Motion to Transfer and Consolidate specifies that the joinder of offenses was appropriate under RCr 6.18 which permits such

> ". . . if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan."

The similarities listed in the Commonwealth's motion included the same victim, the same context (a domestic violence situation and violent sexual acts abusing his estranged wife), the element of "retaliation" involved in the second offense, the offenses began at the same location, and the offenses were only five months apart. Linehan's counsel does not seriously question that a joint trial is proper in this case and that KRE 404(b), which permits a defendant charged with one offense to be incriminated by evidence of other crimes in certain limited and specified circumstances, would seem to apply here. Instead, Linehan argues that, although evidence from independent sources (e.g., from other witnesses) regarding the second set of offenses may be used to prove relevant collateral criminal activity, Linehan's own statement about the circumstances involved in the second set of offenses cannot be used to incriminate him in the trial of the first offenses without violating his constitutional right to have the counsel appointed to represent him present at the police-initiated interrogation.

The statement in question was taken on February 28, 1992. It relates to the circumstances involved in the commission of the offenses specified in the later indictment but it is also circumstantial evidence incriminating the defendant as to the offenses charged in the earlier indictment upon which the defendant had already been arraigned and counsel appointed. The question before us is whether the statement is inadmissible because to permit its use would sanction violating the defendant's constitutional right to counsel.

The answer is the trial court properly suppressed the use of the statement at a joint trial, but if the Common-

wealth elects to try the two indictments separately, the February 28, 1992 statement must be suppressed only in the trial of the September 20, 1991 charges. The statement is admissible in the trial of the February 28, 1992 charges, if tried separately.

Counsel was appointed to represent Linehan when indicted and arraigned on the September 20, 1991 charges, and thereafter he could not be subjected to police-initiated interrogation regarding any evidence incriminating him on the charges for which he had counsel unless his counsel was present. *See Edwards* v. *Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). This is true even though such interrogation was about later offenses to the extent the evidence gathered from him served to incriminate him about the earlier offenses. The use of the statement as to the September 20, 1991 offenses would violate Linehan's Sixth Amendment right to counsel. As summarized in *McNeil* v. *Wisconsin*, 501 U.S. ____, 111 S.Ct. 2204, 115 L.Ed.2d 158, 169 (1991):

> "Our holding in *Michigan* v. *Jackson*, 475 U.S. 625, 69 L.Ed.2d 631, 106 S.Ct. 1404 (1986), . . . [is] that after the Sixth Amendment right to counsel attaches and is invoked, any statements obtained from the accused during subsequent police-initiated custodial questioning regarding the charge at issue (even if the accused purports to waive his rights) are inadmissible."

But Linehan had been neither formally charged nor arraigned with reference to the offenses charged in the second indictment at the time he gave his statement to the police on February 28, 1992. So with reference to the offenses later charged in the second indictment, his Sixth Amendment rights did not apply. The Sixth Amendment right to counsel is "offense-specific. . . it does not attach until a prosecution is commenced." *McNeil* v. *Wisconsin*, *supra*, 115 L.Ed.2d at 166. Thus, with reference to the second set of offenses, Linehan's right to counsel at this February 28, 1992 interrogation was limited to such rights as derived from the Fifth Amendment. This is the so-called

"Miranda-Edwards 'Fifth Amendment' right to counsel." *McNeil* v. *Wisconsin, supra,* 115 L.Ed.2d at 168. Apparently, Linehan has voluntarily waived such rights, and if this is so there is no constitutional barrier to the use of such statements at a separate trial relating solely to the offenses charged in the second indictment.

The Court of Appeals, believing the trial court had erroneously confused the Sixth Amendment right to counsel, which applies to a criminal prosecution, with the Fifth Amendment right of an unrepresented person to counsel, if requested, at a custodial interrogation, reversed the trial court's order that the statement be suppressed and disallowed and remanded to the trial court for further proceedings.

We granted Linehan's motion for discretionary review. We reverse the Court of Appeals and sustain the trial court's order to the limited extent that the statement must be suppressed in any joint trial of the two indictments whererin the statement will incriminate not only as to the new set of offenses but also as to the old offenses. However, in separate trials of the two indictments the statement of February 28, 1992 would be admissible evidence on the new set of offenses occurring that date because Linehan was unrepresented by counsel as to these new charges at the time he was questioned and appears to have voluntarily waived his right to seek the advice of counsel before being interrogated on the new charges or to have counsel present when so interrogated. Thus the answer to the question of whether the February 28, 1992 statement may be used is both yes and no, with "yes" confined to use in a separate trial of the second set of offenses.

Linehan further claims that, because the police who questioned him were aware that he was already indicted and represented by counsel for the earlier offenses, he could not be questioned about new charges which were inextricably intertwined with the old ones unless he was first specifically asked whether he wanted to consult with the attorney already representing him on the previous charges.

This takes us one step beyond the constitutional mandate in *Miranda* v. *Arizona, supra,* and *Edwards* v. *Arizona, supra.*

On the other hand, the Commonwealth argues that since the statement would be admissible in a separate trial on the second set of charges, it should be admissible if the charges are tried jointly. This would leave us one step short of *Michigan* v. *Jackson, supra,* and *McNeil* v. *Wisconsin, supra.* We, of course, intend neither to stop short of the accused's constitutional rights nor to proceed beyond.

The premise underlying the defense counsel's argument is that police questioning of an unrepresented suspect about new offenses when they know of pending charges similar in nature wherein he is represented by counsel constitutes "knowing exploitation by the state of an opportunity to confront the accused without counsel being present." *Maine* v. *Moulton,* 474 U.S. 159, 106 S.Ct. 477, 487, 88 L.Ed.2d 481 (1985). The situation giving rise to this quote was critically different than present circumstances. There is no reason why the police should forego obtaining a voluntary statement from a person who, after *Miranda* warnings, does not invoke the right to counsel simply because they happen to know the suspect has counsel on other charges. Whether the other charges are similar in character or totally different is irrelevant so long as the new evidence thus obtained is not used against the person in the trial of the old charges. Thus we invoke Sixth Amendment protection as to the statement given, but do not extend the reach of Fifth Amendment protection beyond the constitutional mandate. As stated in *McNeil* v. *Wisconsin*:

> "To invoke the Sixth Amendment interest is, as a matter of *fact, not* to invoke the Miranda-Edwards ['Fifth Amendment' right to counsel] interest. One might be quite willing to speak to the police without counsel present concerning many [new] matters, but not the matter under prosecution. . . .'[T]o find that [the defendant] invoked his Fifth Amendment right to coun-

> sel on the present charges merely by requesting the appointment of counsel at his arraignment on the unrelated charge is to disregard the ordinary meaning of the request.'" 115 L.Ed.2d at 168- 69. (Citation omitted.) (Emphasis original.)

We find no constitutional right, federal or state, precluding police- initiated custodial interrogation on new charges, once *Miranda* warngings have been given and a voluntary waiver obtained, and no reason to imply such a right in order to protect existing rights, so long as the evidence thus obtained is not used to incriminate the accused on old charges for which he already has counsel. The accused is adequately protected by suppressing use of the statement in any trial involving the old charges, whether a separate or joint trial, while permitting use of the evidence thus obtained at a separate trial involving only the new charges.

Likewise, we reject the Commonwealth's argument that, simply because the evidence is admissible as to the new charges, the Commonwealth can bootstrap it past Sixth Amendment protection on the old charges by electing to jointly try the old and new offenses. As the Commonwealth's Brief concedes, in *Michigan* v. *Jackson, supra,* the United States Supreme Court "fashioned a protective rule" that "once the Sixth Amendment right to counsel has attached and has been invoked, any subsequent waiver during a police-initiated custodial interview is ineffective." However, contrary to the Commonwealth's argument, this protection does not evaporate because joinder is permissible. Constitutional protection cannot be held hostage to trial tactics. The Commonwealth cites *McNeil* v. *Wisconsin* in support of its argument, but the salient fact in *McNeil* is that statement obtained about the new offenses (the *unrepresented* charges) was *not* offered to incriminate *McNeil* on the old offense (the *represented* charge). The issue in *McNeil* related solely to suppression in trial of the new "unrelated" charges. *McNeil supra,* 115 L.Ed.2d at 166.

The police and prosecutorial authorities are at libery to question a willing suspect about new offenses without regard to whether there is prosecution pending on other charges, whether simiar or different in nature, but they must be cognizant that the evidence thus obtained may not be used to incriminate him on pending charges wherein he is represented unless his counsel is present.

For the reasons stated, we reverse the decision of the Court of Appeals and affirm the suppression order of the trial court, with the understanding that the trial court's order is interlocutory in character and that the Commonwealth, if the trial court so permits, may elect to sever the indictments for trial. In such event, use of the statement of February 28, 1992 to incriminate the accused on the new offenses would be proper, but use as evidence against him on trial of the first set of offenses is constitutionally impermissible.

Stephens, C.J., Lambert, Leibson and Stumbo, JJ., concur. Wintersheimer, J., dissents by separate opinion in which Reynolds and Spain, JJ., join.

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93-SC-432-DG

SUPREME COURT OF KENTUCKY

DAVID WAYNE LINEHAN - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - - - *Appellee*

On Review From Court of Appeals
No. 92-CA-1940
Jefferson Circuit Court
No. 91-CR-1977
Hon. Ken G. Corey, Judge

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I respectfully dissent from the majority opinion because I disagree with the application of the law to the facts of this case. Even though the majority opinion differentiates between evidence pertaining to the first set of charges, the subsequent holding fails to consider such a distinction.

The majority opinion is correct when it states that the second statement would be allowed in a separate trial regarding the second set of charges. It is also correct when it states that the evidence from the second statement which relates to the first set of charges may not be used in either a separate or joint trial on the first set of charges. How-

ever, there is a third possiblity which the majority opinion and the trial court did not consider. In a joint trial, testimony from a second statement which does not relate to the first set of charges may be admitted without violating the constitutional right of the defendant. This alternative is not considered and for that reason I must dissent.

In addition, I believe that this case is governed by the decision of the United States Supreme Court in *McNeil* v. *Wisconsin*, 501 U.S. ____, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). As noted in that case, the Sixth Amendment right is offense-specific. It cannot be invoked once for all future prosecutions for it does not attach until a prosecution is commenced, that is, "at or after the initiation of an adversary judicial criminal proceeding." The court goes on to note that the police have an interest in investigating new or additional crimes and to exclude evidence pertaining to charges to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because of other charges pending at the time would unnecessarily frustrate the public's interest in the investigation of crimial activitites.

Here the defendant was arrested and questioned regarding the February, 1992 charges and no adversarial criminal proceedings concerning those charges had been instituted against him. Consequently, the defendant's Sixth Amendment right to counsel was not violated and the trial court erred by suppressing his incriminating statements regarding the February, 1992 offenses.

The 1991 and 1992 charges are related in the sense that they involve the same victim and similar charges. However, in view of the passage of more than five months between the commission of the first and second offenses, it is clear that the 1992 offenses were separate, distinct and unrelated to the offenses charged in the earlier indictment.

The Court of Appeals was correct in the manner in which it disposed of this case and should be affirmed by this Court.

Reynolds and Spain, JJ., join in this dissent.

No. 91 CR 1977
92 CR 0514

JEFFERSON CIRCUIT COURT
DIVISION ELEVEN
JUDGE KEN G. COREY

COMMONWEALTH OF KENTUCKY - - - - - *Plaintiff*

v.

DAVID WAYNE LINEHAN - - - - - - *Defendant*

ORDER—Entered July 29, 1992

This Commonwealth's motion to admit statements made by the victim to Rene Hutchins on September 20, 1991, is granted subject to the Court interviewing Rene Hutchins out of the presence of the jury, and before her testimony at trial.

IT IS FURTHER ORDERED that statements made by the victim to Steve Simmons and Carolyn Simmons on Febrary 28, 1992, are admitted under the same circumstances as set out above.

The defendant's motion that the statement taken from the defendant on February 28,1992, is suppressed and disallowed for use at trial, in that the defendant had counsel of record. The motion to suppress testimony concerning specimens is denied, in that the taking of such specimens would have been allowable over and above any objection by counsel for the defendant pursuant to the laws of this Commonwealth.

The defendant's motion for an evidentiary hearing and/or depositions of the witnesses is denied.

The matter is passed for further pretrial to August 17, 1992, for Mr. Shelton to file further pretrial motions.

/s/

Ken G. Corey, Judge
29 July '92

cc: Gina K. Calvert,
Assistant Commonwealth's Attorney

Rob Shelton,
Assistant Public Defender

Entered in Court: July 29, 1992

RENDERED: MAY 21, 1993
NOT TO BE PUBLISHED

No. 92-CA-1940-MR

COURT OF APPEALS OF KENTUCKY

COMMONWEALTH OF KENTUCKY - - - - - *Appellant*

v.

DAVID WAYNE LINEHAN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Ken G. Corey, Judge
Action Nos. 91-CR-1977 and 92-CR-514

REVERSING AND REMANDING

BEFORE: GARDNER, GUDGEL, and MILLER, Judges.

GUDGEL, JUDGE: This is an appeal from an order entered by the Jefferson Circuit Court granting a motion to suppress certain incriminating statements made by appellee during a police custodial interrogation. On appeal, the commonwealth's principal contention is that the court erred by finding that the incriminating statements were obtained in violation of appellee's Sixth Amendment right to counsel. We agree. Hence, we reverse and remand.

On September 20, 1991, appellee was arrested and charged with the offenses of first-degree rape and first-degree burglary based upon complaints filed by his

estranged wife. Upon questioning, after waiving his *Miranda* rights, appellee admitted to the burglary but claimed that the sexual acts were consensual. Appellee subsequently was indicted on both charges and an attorney from the public defender's office was appointed to represent him.

On February 28, 1992, while free on bail, appellee was arrested for kidnapping, first-degree rape, second- degree assault, initimidating a witness, and three counts of first-degree sexual abuse stemming from additional incidents involving his estranged wife. After being advised of and waiving his *Miranda* rights, appellee made voluntary and incriminating statements to the police concerning the new charges. Appellee subsequently was indicted on the new charges and another attorney from the public defender's office was appointed to represent him on those charges.

Appellee filed a motion to suppress his incriminating statements regarding the second set of charges, contending that the statements were obtained in violation of his Sixth Amendment right to counsel since the attorney who was appointed to represent him on the first set of charges was not notified that the police intended to question him concerning the second set of charges. Without conducting an evidentiary hearing, the court granted the motion to suppress on the ground that appellee was "represented by counsel" when he made the incriminating statements. This appeal followed.

First, the commonwealth contends that the court erred by failing to conduct a suppression hearing. We disagree.

True enough, ordinarily a court is required to conduct a hearing on a suppression motion. RCr 9.78. However, contrary to the ordinary situation, here there was no need to conduct an evidentiary hearing on the motion because the relevant facts were undisputed and no factual determi-

nations were necessary. Hence, in these particular circumstances, a hearing on the motion would have been pointless.[1]

Next, the commonwealth contends that the court erred by granting the motion to suppress. We agree.

The issue in this case is governed by the United States Supreme Court's recent decision in *McNeil* v. *Wisconsin*, ___ U.S. ___, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). The defendant therein was arrested in connection with an armed robbery committed in West Allis, Wisconsin. He was advised of his *Miranda* rights but refused to answer any questions regarding the crime. Subsequently, McNeil was arraigned, a preliminary hearing was scheduled, and a public defemder was appointed to represent him. Later, while still in custody, McNeil was questioned by the police on three occasions regarding a murder, armed buglary, and attempted murder committed in Caledonia, Wisconsin. On each of these three occasions, McNeil was advised of but waived his *Miranda* rights. Apparently, his appointed counsel was not notified that this questioning would occur although the Court's opinion is silent on this point. Subsequently, McNeil's incriminating statements were utilized over his objection to convict him of the Caledonia crimes. In affirming McNeil's convictions, the Court stated:

> The Sixth Amendment right, however, is offense-specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, " 'at or after the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hear-

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[1]We note, however, that the record is silent as to whether appellant made any incriminating statements on February 28, 1992, relating to the September 20, 1991, offenses. If he did make any such statements, the court on remand should suppress those statements as having been obtained in violation of appellant's right to counsel respecting the earlier offenses.

ing, indictment, information, or arraignment.'" *United States* v. *Gouveia*, 467 U.S. 180, 188, 104 S.Ct. 2292, 2297, 81 L.Ed.2d 146 (1984) (quoting *Kirby* v. *Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972) (plurality opinion)). . . .

"The police have an interest . . . in investigating new or additional crimes [after an individual is formally charged with one crime.] . . . [T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. . . ." *Maine* v. *Moulton*, 474 U.S. 159, 179-180, 106 S.Ct. 477, 488-489, 88 L.Ed.2d 481 (1985).

"Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses." *Id.*, at 180, n. 16, 106 S.Ct. at 489, n. 16.

McNeil, ____ U.S. at ____, 111 S.Ct. at 2207-08.

Here, when appellee was arrested and questioned regarding the February 1992 charges, no adversarial judicial criminal proceedings concerning those charges had been instituted against him. Pursuant to *McNeil*, therefore, we conclude that apepllee's[sic] Sixth Amendment right to counsel was not violated and that the trial court erred by suppressing his incriminating statements concerning the February 1992 offenses.

Further, we are not persuaded by appellee's contention that this case is distinguishable from *McNeil*. True enough, the 1991 and 1992 offenses are related in the sense that they involve the same victim and similar charges. However, in view of the passage of more than five months between the commission of the first and second sets of offenses, it is clear that the 1992 offenses were separate, distinct, and unrelated to the offenses charged in the earlier indictment. Indeed, to hold otherwise would "seriously

impede effective law enforcement. . . . Thus, if we were to adopt petitioner's rule, most persons in pretrial custody for serious offenses would be *unapproachable* by police officers suspecting them of involvement in other crimes, *even though they have never expressed any unwillingness to be questioned.*" (Emphasis in original.) *McNeil*, ____ U.S. at ____, 111 S.Ct. at 2210.

Finally, we conclude that there is no merit to appellee's contention that there was some type of a collusive strategy utilized by the police and the prosecutor below. There is nothing in the record to remotely suggest that any such improper actions occurred.

The court's order is reversed and remanded for further proceedings consistent with our views.

ALL CONCUR.

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RENDERED: MAY 26, 1994
NOT TO BE PUBLISHED

92-SC-1016-MR

SUPREME COURT OF KENTUCKY

GLENN FRED PHILLIPS, JR. - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Hon. Edwin A. Schroering, Judge
(92-CR-1990)

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The appellant, Glenn Fred Phillips, Jr., was convicted of robbery in the first degree and of being a second-degree persistent felony offender. The appellant was sentenced to thirty years imprisonment. He appeals to this Court as a matter of right.

FACTS

Evidence at trial was that on October 14, 1991, and October 15, 1991, two separate convenient-type stores were robbed. The robberies were similar in many details which will be described below. During the second robbery the perpetrator was confronted by and fought with an off-duty corrections officer, who later identified appellant from a photopak.

The appellant was first apprehended by Louisville City Police in connection with the October 15tl robbery of the Thronton's Food Store. Before being taken to jail, he was questioned for an hour at the Robbery Squad Office. It was at this time, appellant claims, that he asked for an attorney but was not allowed to see one.

While in jail for the October 15th robbery, appellant was visited by Officer Larry Duncan of the Jefferson County Police Department, the investigating officer of the October 14th Convenient Store robbery. Appellant and the officer talked for approximately twenty minutes before the tape recorder was turned on. Appellant maintains he was being threatened and coerced; the officer reports that they were simply discussing the robbery. At some point, appellant gave incriminating statements which he later moved to suppress.

The suppression hearing focused on this jailhouse interrogation. Both appellant and Officer Duncan testified as to their own versions of the jailhouse visit. There was also conflicting testimony concerning whether appellant had voluntarily waived his Miranda rights. The trial judge stated that he was inclined to believe the officer and denied appellant's motion to suppress.

At the same hearing, the judge denied a motion to suppress a photopak identification, as well. Appellant was tried to a jury on May 7, 1992.

During deliberations the jury sent a note to the judge asking: (1) to view the video tape of the Convenient Store robbery; (2) to see defedant without glasses and with his hand in front of his face; (3) whether appellant's tattoo is permanent or temporary; (4) the color of appellant's eyes. The trial court allowed the jury to review the video that was in evidence, but refused to allow the jury to view the defendant or to answer the other questions. The appellant was convicted and this appeal followed.

The first allegation of error by the appellant is that the trial court erred when it refused the request of the jury to

view appellant's eyes and tattoo during deliberations. The appellant further contends that information was given to the jury outside of open court and in his absence. The Commonwealth contends there was no error because the trial court correctly ruled that this was not a critical stage of the proceeding.

RCr 9.79 states that "[n]o information requested by the jury or any juror after the jury has retired for deliberation shall be given except in open court. . . " The trial judge did not violate this rule merely by telling the jury to decide the case based upon the evidence at trial. Furthermore, the trial court did comply with RCr 9.74 when the video tape was played in open court and the appellant voluntarily chose to be absent.

The appellant also contends that RCr 8.28 was violated when he was not initially present when the trial judge discussed the proper answer to the jury's questions with the appellant's attorney and the prosecutor. RCr 8.28 requires that the defendant be present at every critical stage of the trial. The answering of jury questions is not such a critical stage of the trial so as to require the appellant's presence. *Levi* v. *Commonwealth*, Ky., 405 S.W.2d 559 (1965), *cert. denied*, 385 U.S. 956, 87 S.Ct. 391, 17 L.Ed.2d 303 (1966). We find no violation of RCr 8.28.

With these two prior rulings in mind we will make a palpable error analysis of the appellant's claim that the trial court should have allowed the jury to view his eyes and tattoo. The appellant is correct in his assertion that the Commonwealth could have compelled him to show his eyes and tattoo at trial. *United States* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1179 (1967). But is is also true that appellant himself could have placed his eye color and tattoo into evidence during the trial. Where the appellant failed to do so, he precluded the jury from having that evidence during deliberations.

Once the jury has begun deliberations, the general rule is that no new evidence may be admitted. We cannot say

that a substantial right of the appellant has been violated. The appellant could have introduced evidence at trial of his eye color and tattoo and did not, thus he cannot now complain that a substantial error occurred.

Second, the appellant argues that the trial court abused its discretion by not granting a continuance after the appellant was escorted in view of potential jurors while in handcuffs and further that he was prejudiced because he was not given a copy of the grand jury proceedings until the day of the trial. Under RCr 9.04, the trial court is given wide discretion in whether to postpone a hearing or trial. Our standard of review is whether the trial court abused its discretion. *Corbett* v. *Commonwealth*, Ky., 717 S.W.2d 831 (1986).

We find that the trial court did not abuse its discretion. A jury's brief sight of the defendant in handcuffs is not reversible error in itself. *Marion* v. *Commonwealth*, Ky., 108 S.W.2d 721 (1937). The appellant was led through the courthouse hallway in the morning before 10:22 a.m., and the jury selection process did not begin until 2:00 p.m. The trial court noted that the courthouse was crowded and that numerous individuals were roaming the hallways. The lapse of almost four hours reduced the possibility that appellant's rights may have been violated. Furthermore, the appellant has not shown that any of the jurors actually impaneled saw him and therefore has not shown a violation of a substantial right. We find no error.

The appellant further asserts that he should have received a transcript of the grand jury proceeding before the day of trial. RCr 5.16(3) does give the appellant the right to have a copy of the transcript from the grand jury proceeding upon request. It does not provide a specific time period for this disclosure.

The appellant was indicted twice in anticipation of our decision in *Commonwealth* v. *Nelson*, Ky., 841 S.W.2d 628 (1992). The appellant only contends that he did not receive a copy of the reindictment. The appellant had access

to the original indictment transcript and has not alleged that the testimony was different from that offered for the original indictment, nor has he alleged that the Commonwealth purposely delayed or inhibited the appellant from receiving a copy of the transcript. We find no error.

The third issue raised by the appellant is whether the trial court should have excluded a prior conviction based on an *Alford* plea from evidence during the persistent felony sentencing stage. We have recently decided this issue in *Pettiway* v. *Commonwealth*, Ky., 860 S.W.2d 766 (1993). In *Pettiway*, we held that a conviction under an *Alford* plea is admissible in determining PFO status. We see no reason to revisit that holding, and affirm on this issue.

The fourth error the appellant alleges is that the trial court erred by not suppressing identification testimony based upon alleged suggestiveness of a photopak. The appellant's contention is that he was the only person in the photopak without a shirt. In this case, there was no allegation that the robber was shirtless, and the trial court after viewing the display, was struck only by the fact that one of the other individuals was wearing a red shirt.

The photopak used did not create a substantial likelihood of misidentification. *Neil* v. *Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). It is supported by independent trial testimony also identifying the appellant as the robber. The trial court found the photopak not to be suggestive.

In *Wilson* v. *Commonwealth*, Ky., 695 S.W.2d 854 (1985), we set forth a two- part test for determining whether pretrial confrontation violates due process. We first must determine whether the procedure was suggestive. If found suggestive, then the procedure is assessed based upon the possibility that a viewing witness could make an irreparable misidentification.

We agree with the trial court that the photopak was not suggestive, therefore we need not reach the second prong of the analysis. The identification testimony was properly admitted.

The fifth error alleged by appellant is that the trial court erred when it overruled the appellant's motion to suppress his confession to the October 14th robbery. His challenge is based not on his earlier claim that the confession, itself, was involuntary. Instead, he asserts that the *waiver* of his Miranda rights secured by Detective Duncan at the jail was involuntary. His argument is premised on the allegation that during the questioning that occurred in the Robbery Squad Office about the October 15th Convenient Store incident, he was not allowed to see an attorney. It is his theory that since he had asserted his fifth amendment right to counsel preceding the first interrogation, then under *Arizona* v. *Roberson*, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988), it was a violation of his rights for Detective Duncan to even seek a Miranda waiver before the second interrogation, although Duncan wished to question him about a different crime.

Appellant's theory would have merit, if it had ever been established that he had, in fact, invoked his fifth amendment right to counsel. In *Roberson*, the U.S. Supreme Court stated:

> As a matter of law, the presumption raised by a suspect's request for counsel — that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance — does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation.

Id. at 2099. However, the factual premise of *Roberson* (that the suspect there had exercised his fifth amendment right to counsel) is fatally absent from the record in this case. At oral argument, counsel for appellant acknowledged the absence of a specific finding, and asserted that the trial judge's failure to rule on this issue entitles appellant to remand for a new suppression hearing. We strongly disagree.

This Court cannot review allegations of error based upon a record that does not exist. If appellant wished to

pursue the issue of whether he had invoked his fifth amendment right to counsel, his opportunity to do so was at the trial court level. When this issue was not resolved by the judge's ruling admitting appellant's confession, counsel could and should have asked for a specific finding in order to preserve the question for appeal. *See* CR 52.04; RCr 13.04; *Blankenship* v. *Commonwealth*, Ky.App., 554 S.W.2d 898 (1977). As counsel did not, the record remains silent and this issue unpreserved. We therefore affirm the trial judge's decision to admit appellant's confession into evidence.

The sixth issue raised by appellant is that the trial court erred by not severing the two robbery charges at trial. We disagree.

Appellant contends he was unduly prejudiced by being forced to defend against two separate charges consolidated for trial. His argument is that once his confession to the October 14th robbery was admitted into evidence over his objection, he was compelled to take the stand to testify that it was coerced and untrue. This, of course, prevented appellant from exercising his right to remain silent as to the October 15th charge. While this circumstance indeed presents appellant with strategic difficulties, in the absence of prejudice, it is no defense to consolidation. *Owens* v. *Commonwealth*, Ky., 572 S.W.2d 415 (1977). More recently in *Rearick* v. *Commonwealth*, 858 S.W. 2d 185 (1993), this Court agains addressed the issue of severance. We stated in effect, that unless the appellant could show prejudice through jury exposure to damaging evidence it would *not* have been exposed to with separate trials, this argument is not sufficient to warrant a severance. *Id.* at 187. This holding echoes the well-established rules that dictate when severance is required.

The criminal rule on joinder of offenses states that two or more offenses may be joined "if the offenses are of the same or similar character. . . " RCr 6 18. If the defendant has moved to sever and in the judgment of the trial court, the defendant has established that prejudice would result

from joint trial of the offenses, severance is required. RCr 9.16. One test for determining prejudice is whether evidence of one offense would have been admissible in a trial for the second offense, had there been separate trials. *Hayes* v. *Commonwealth*, Ky., 698 S.W.2d 821 (1985). "[E]vidence of other acts . . . must be so similar to the crime on trial as to constitute a so-called signature crime." *Rearick* at 187. (quoting *Billings* v. *Commonwealth*, Ky., 843. S.W.2d 890 (1992).

In this case the similarities between the two robberies are striking enough to conclude that the Commonwealth could have introduced evidence of each at separate trials to establish appellant's common scheme or plan. The offenses each occurred at convenience stores on consecutive nights, less than 9/10 of one mile apart from one other, between 9:20 p.m. and 11:13 p.m. each night. In both robberies, the perpetrator obscured his face in some fashion, used a handgun to threaten a female cashier, and fled the scene on foot. In each case different eyewitnesses not only gave descriptions of what appeared to be the same person, but at least one witness in each case later identified appellant as the perpetrator. More significant were the similarities which can reasonably be viewed as "signature" aspects of the crime. In each robbery the perpetrator referred to the cashier as "Bitch," and then assisted her in removing money from the cash register.

Appellant does not dispute that the similarities in detail established at trial might be admissible in separate trials, but claims that the *confession* as to the October 14th robbery would not have been admissible in a separate trial on the October 15th robbery. Appellant cites no authority for that proposition, but it is clearly based upon his argument, rejected by this Court, that the taking of his confession violated his right-to-counsel protections.

It should be noted that this issue is similar to, but clearly distinguishable from *Linehan* v. *Commonwealth*, Ky., ____ S.W.2d ____ (rendered May 26, 1994), where this Court reversed based on the argument appellant now

makes. In *Linehan*, as in the present case, the defendant was arrested on a second set of charges after he had been arraigned and represented by counsel on a set of earlier, substantially similar charges involving the same victim. Like appellant, he waived his Miranda rights, was questioned and made statements incriminating himself as to the commission of the later charges.

Unlike appellant, however, Linehan also made statements that were circumstantially incriminating as to the earlier charges against him. The trial court sustained Linehan's motion to suppress, reasoning that the incriminating statement was taken in violation of his sixth amendment right to counsel. The Commonwealth took an interlocutory appeal to the Kentucky Court of Appeals pursuant to KRS 22A.020(4). The Court of Appeals reversed on the basis of *McNeil* v. *Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991), where the U.S. Supreme Court held that the sixth amendment right to counsel is "offense-specific." Linehan appealed.

This Court reversed to the extent that the Commonwealth planned to use the confession against Linehan in a single trial prosecuting both sets of offenses. We held that to allow the admission of a later-gained statement which also incriminated Linehan as to the first set of charges (for which he had already secured counsel) in a consolidated trial would, indeed, violate his sixth amendment right to counsel. We observed that the protection provided by the sixth amendment "does not evaporate because joinder is permissible." *Id.* at ___.

However, as mentioned above, the present case differs from *Linehan* in a crucial aspect. Under the present facts, appellant's confession was absolutely limited in scope to the separate crime about which he was being questioned. The officer interrogating appellant as to the October 14th robbery deliberately did not elicit any information from appellant as to his alleged involvement in the October 15th robbery for which he had already been arraigned while represented by counsel. Because appellant's confession to

the October 14th robbery in no way incriminated him as to the October 15th robbery, its admission in a single trial for both offenses did not violate his sixth amendment right to counsel.

For the above reasons, appellant's conviction is affirmed.

All concur.

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92-SC-001016-MR

SUPREME COURT OF KENTUCKY

GLENN FRED PHILLIPS, JR. - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Hon. Edwin A. Schroering, Jr., Judge
(No. 92-CR-001990)

ORDER

The Commonwealth's motion to publish the opinion rendered in the above-styled action is denied.

ENTERED July 7, 1994.

/s/
Robert F. Stephens
Chief Justice